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DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 330

RIN 0710-AA60

Nationwide Permit Program

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers is amending its nationwide permit regulations so that district engineers can issue nationwide permit verification letters that expire on the same date a nationwide permit expires. This amendment will provide regulatory flexibility and efficiency, by allowing district engineers to issue nationwide permit verifications that are valid for the same period of time a nationwide permit is in effect. We are also amending these regulations to reflect the 45-day pre-construction notification review period that has been in effect for the nationwide permit “pre-construction notification” general condition since June 7, 2000.

DATES: Effective date: [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN FEDERAL REGISTER].

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW-CO, 441 G Street NW, Washington, DC 20314-1000.

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Regulatory Home Page at

<http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx> .

#### SUPPLEMENTARY INFORMATION:

##### Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWP) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The NWP authorize activities that have minimal individual and cumulative adverse environmental effects. The NWP are proposed, issued, modified, reissued, and revoked from time to time (generally five years), after an opportunity for public notice and comment.

Some NWP require project proponents to notify Corps district engineers prior to commencing NWP activities. These notifications are called pre-construction notifications (PCN), and they provide district engineers with opportunities to confirm whether or not the proposed activities qualify for NWP authorization. For most NWP, the district engineer has to respond within 45 days of receipt of a complete PCN. If, after reviewing the PCN, the district engineer determines that the proposed activity qualifies for NWP authorization, the district engineer issues an NWP verification letter to the project proponent. The NWP verification may contain special conditions to ensure that the NWP activity results in minimal individual and cumulative effects on the aquatic environment and the Corps public interest review factors.

This rule has two effects:

1. Most NWP, through the application of the PCN general condition, have a 45 day review period for PCNs. The NWP regulations, however, dating back to 1991, still specify the default PCN review period as 30 days. This final rule makes the NWP regulation consistent with the current NWP PCN general condition, which will reduce confusion and ensure consistent implementation.
2. NWP are reissued every 5 years, but NWP verification letters expire within two years. This rule will change the verification letter expiration date to be the same as the expiration date of the applicable NWP(s). This will ease the regulatory burden on permittees whose construction is not completed within two years by making it unnecessary to reverify the NWP authorization.

### Background

The last reissuance of the NWP, including the PCN general condition (general condition 31), was published in the February 21, 2012, issue of the Federal Register (77 FR 10184). The 2012 NWP expire on March 18, 2017. The Corps regulations governing the NWP program are provided at 33 CFR part 330. The current NWP regulations were published in the Federal Register on November 22, 1991 (56 FR 59110).

Section 330.1(e) of the 1991 rule provided district engineers with 30 days to review notifications to determine whether proposed NWP activities result in minimal individual and cumulative adverse environmental effects and are in the public interest. Section 330.6(a)(3)(ii) of the 1991 regulation stated that NWP verification letters can be valid for no more than two years. Since 1991, there have been substantial changes to the NWP program and other Federal programs that warrant amendments to these provisions.

In the November 30, 2004, issue of the Federal Register (69 FR 69563) we published a proposed rule to amend these provisions of the NWP regulations:

1. In §330.1(e)(1) and §330.4(c)(6) and (d)(6), we proposed to change the PCN review period from 30 days to 45 days, to conform with the length of the PCN review period that has been in use for certain NWPs since 1996. On June 7, 2000, the 45-day PCN review period was applied to all NWPs requiring pre-construction notification (see 65 FR 12818). The 45-day PCN review period is found in the “pre-construction notification” general condition of the NWPs (currently general condition 31).
2. In §330.6(a)(3)(ii) we proposed to change the length of time an NWP verification would be valid from two years to the expiration date of the NWP.

#### Comments and Revisions

In response to the proposed rule, 15 comments were received. One commenter expressed general support for the proposed revisions and two commenters said that the proposed rule should be withdrawn.

Two commenters said that the proposed rule violates the Administrative Procedure Act (APA) because the impacts of proposed rule are not fully explained. These commenters also said that changing the PCN review period from 30 days to 45 days is not consistent with agency practice, because the Corps did use APA rulemaking procedures to change the PCN review period to 45 days.

We complied with APA requirements when we undertook this rulemaking to amend the NWP regulations. In the preamble to the November 30, 2004, notice of proposed rulemaking, we provided a concise explanation of the basis and purpose of the

proposed amendments to specific sections of 33 CFR part 330, and discussed their anticipated effects. As discussed in the proposed rule, the purpose of amending these sections of 33 CFR part 330 is to make the NWP regulation consistent with those provisions in the general condition addressing the timing of PCN processing that has been in effect for all NWPs since June 7, 2000, and to provide regulatory efficiency when issuing NWP verification letters.

We also complied with APA requirements when we issued and reissued NWPs in 1996, 2000, 2002, 2007, and 2012, with 45 day PCN review periods in the “pre-construction notification” general condition. In the June, 17, 1996, proposal to reissue NWPs (61 FR 30786), we solicited comments on increasing the notification review period for NWP 26 from 30 days to 45 days. In the July 21, 1999, proposal to issue five new NWPs and modify six existing NWPs to replace NWP 26 (64 FR 39341), we requested comments on increasing the PCN review period to 45 days for all NWPs. In the August 9, 2001 (66 FR 42070), September 26, 2006 (71 FR 56296), and February 16, 2011 (76 FR 9174) proposals to issue and reissue NWPs, we solicited comments from interested parties on a proposed PCN review period of 45 days. Comments received in response to those proposals were fully considered, and the 45 day PCN review period was adopted in the final NWPs. In the preambles to the Federal Register notices announcing the final NWPs, we also provided responses to comments that were received. Therefore, in each of these cases, the APA procedures were used to promulgate the terms and conditions of the NWPs. Today’s final rule concludes the rulemaking process for making the appropriate sections of 33 CFR part 330 consistent with the NWPs currently in effect, and for changing the length of time an NWP verification could be in effect.

Two commenters asserted that the proposed rule violates the Regulatory Flexibility Act (RFA), because its impacts are not fully explained, and the Corps did not discuss economic impacts or their potential significance. One commenter said that the 30 day completeness review and 45 day PCN review period adopted in the 2000 NWP's and subsequent NWP's must be in the final rule or else the impacts on small entities would be substantial. This commenter also stated that the final rule needs to include the provisions of the "construction period" general condition for the 2002 NWP's for impacts on small entities to be insubstantial.

We have revised our RFA analysis to better explain the impacts of the final rule on small entities. The RFA analysis is provided below in the "Administrative Requirements" section of this preamble. We do not agree that it is necessary to incorporate the 30 day completeness review into §330.1(e)(1) for this rule to have an insubstantial impact on small entities. The 30-day completeness review is currently addressed through the terms of general condition 31 (pre-construction notification) of the 2012 NWP's, as published in the February 21, 2012, issue of the Federal Register.

For reasons cited in the March 12, 2007, notice of the reissuance of the NWP's, the "construction period" general condition that was adopted in 2002 was not retained in the current NWP's (see 72 FR 11171). Removal of this general condition will not cause the NWP's to result in substantial impacts on small entities. Its removal was necessary to be consistent with Section 404(e)(2) of the Clean Water Act.

#### Forty-five day PCN review period

Several commenters objected to increasing the PCN review period in 33 CFR part 330 from 30 to 45 days. Several commenters stated that the longer PCN review period is

contrary to the original intent of NWP program, which is to streamline the authorization process. Two commenters said that increasing the PCN review period would delay time sensitive activities, such as activities occurring in areas with short construction seasons. One commenter stated that changes to the “pre-construction notification” general condition for the nationwide permits does not require conforming changes to part 330, since permit conditions can be more stringent than regulations. Another commenter said that it is unnecessary to change the NWP regulations, since the timing requirements in the “pre-construction notification” general condition can change whenever the NWPs are reissued. Two commenters stated that the proposed changes will have significant impacts on small entities when they are compared to the NWP regulations promulgated in 1991.

Changing the PCN review period in 33 CFR part 330 from 30 days to 45 days will make the NWP regulation consistent with the “pre-construction notification” general condition for the current NWPs. It should also be noted that the 2007 and 2012 NWPs were promulgated as rules under the Administrative Procedures Act. By establishing the same time frames in the NWPs and their governing regulations, this amendment will also help ensure consistent interpretation and implementation of the NWP terms and conditions and the NWP regulations.

The longer processing times for NWP verification requests are not directly due to changes to the “pre-construction notification” general condition or the Corps’ regulations governing the NWP program. Longer processing times are a result of the increased complexity of the regulatory environment that has occurred since 1991 as a result of judicial decisions and changes in laws and regulations. Since the 1991 rule was issued, there have been substantial changes in Federal laws and regulations that have affected the

implementation of the Corps Regulatory Program, as well as changes in agency practices and policies such as compensatory mitigation requirements and jurisdiction. These changes have caused increased processing times for NWP PCNs, as well as applications for other types of DA permits.

For example, the promulgation of regulations in 1997 and 2002 to implement the essential fish habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act has resulted in an additional consultation requirement for many activities authorized by Corps permits. As another example, the Advisory Counsel on Historic Preservation issued revised regulations in 2000 and 2004 that govern Section 106 of the National Historic Preservation Act, which has resulted in changes in processing procedures for DA permits under interim guidance issued by the Corps on April 25, 2005, and January 31, 2007.

Compensatory mitigation is often required to ensure that NWP activities result in minimal individual and cumulative adverse effects on the aquatic environment. Compensatory mitigation proposals can be complex documents that require technical review to determine whether the proposed compensatory mitigation projects are feasible and will effectively offset authorized losses of aquatic resources. Since 1991, there have also been changes to the Regulatory Program's compensatory mitigation policies, such as the issuance of Regulatory Guidance Letter 02-02 on December 24, 2002. Although the Corps regulations for compensatory mitigation for losses of aquatic resources at 33 CFR part 332 were issued (see 73 FR 19594) after this proposed rule was published, the requirements for implementing that rule still support these changes to the NWP regulations.



Prior to issuing a verification letter for an NWP activity, the district engineer must review the mitigation statement or conceptual or detailed compensatory mitigation plan within 45 days of receipt of a complete PCN (see paragraph (b)(5) of NWP general condition 31 (77 FR 10287)). During this time period, the district engineer must also determine whether the proposed NWP activity, in conjunction with any proposed compensatory mitigation, will result in no more than minimal individual and cumulative adverse effects on the aquatic environment and other public interest factors. The 45-day review period provides district engineers with time to effectively review compensatory mitigation statements or proposals submitted with PCNs, or to exercise discretionary authority if the net adverse effects on the aquatic environment are determined to be more than minimal.

Despite these and other changes in the regulatory environment, NWP verification processing times are still substantially less than processing times for individual permits (see below). Amending the NWP regulations so that the PCN review period is the same as the PCN review period in the “pre-construction notification” general condition will not significantly impact small entities, since the 45-day PCN review period has been in effect for all the NWPs since 2000.

Two commenters said that the proposed changes will significantly affect the regulated public because of the increase in NWP processing times from 16 days in 1998 to 27 days in 2003. One commenter said that the Corps should discuss alternatives to reduce NWP processing times or reduce the need for changing the regulation.

During the period of 1998 to 2003, the processing times for all types of DA permits have increased, with NWPs showing the smallest increase. In fiscal year 2010,

the average processing time for a standard permit application was 221 days and for NWP pre-construction notifications the average processing time was 32 days. We do not believe that this final rule will change the average processing times for NWP verification requests, since it reflects long-standing NWP PCN processing practices as provided in the “pre-construction notification” general condition. When one considers the changes in processing times that have occurred for the various types of DA permits, the NWP program still fulfills its intent of reducing delays and paperwork to authorize activities that have minimal adverse effects on the aquatic environment. Developing alternatives to the NWP program to reduce processing times, while complying with the requirements of applicable laws and regulations, such as the Endangered Species Act and the National Historic Preservation Act, is not feasible.

Two commenters stated that the proposed amendments are unnecessary, since the average review period for NWP verifications in 2003 was 27 days. One commenter disagreed that the average processing time for NWP verification requests was 27 days in 2003, and said that the processing times are usually longer than 27 days. Two commenters remarked that increasing the PCN review period from 30 days to 45 days should not alter processing times for NWP PCNs. Several commenters stated that the proposed amendment would increase processing times.

It is important to understand that the 27 day average review period cited in the proposed rule is the mean processing time for NWP PCNs and other NWP verification requests. Processing times may be longer for specific proposed activities, especially for NWP activities where consultation with other agencies is required to comply with other Federal laws, such as Section 7 of the Endangered Species Act and Section 106 of the

National Historic Preservation Act. In those situations, the NWP authorization may be suspended until the required consultation is completed, resulting in longer processing times.

Two commenters said that if the 45-day PCN review period is adopted in the final rule, the Corps should implement expedited NWP processing procedures to offset the delays that they believe will result from that change.

As discussed above, we do not believe that this amendment to the NWP regulations will alter NWP PCN processing times. The NWPs still provide a streamlined form of authorization for certain activities that result in minimal individual and cumulative adverse effects on the aquatic environment.

Two commenters said that increasing the PCN review period to 45 days will change implementation of paragraph (a) of the “pre-construction notification” general condition for the NWPs. Paragraph (a) requires the district engineer to determine if a PCN is complete within 30 days of the date of receipt of the PCN, and if additional information is necessary to make the PCN complete, to request the additional information within that 30 day period. These commenters stated that changing the PCN review period in section 330.1(e)(1) would remove the 15 days between the end of the 30-day completeness review and the end of the 45-day PCN review. One commenter said that the proposed amendment would result in a 45-day completeness review for NWP PCNs.

This amendment does not affect the timing provisions of the “pre-construction notification” general condition, including the 30-day period for making completeness determinations for PCNs. In accordance with the current “pre-construction notification” general condition (general condition 31 of the 2012 NWPs), district engineers are still

required to make their completeness determinations within 30 days. The 45-day clock for making a decision on a PCN still begins on the date a complete PCN is received by the district.

One commenter remarked that the proposed rule should have discussed potential effects of the amendment on program efficiency, specifically the time necessary to determine that a PCN is complete. This commenter noted that the 2001 Energy and Water Development Appropriations Act requires the Corps to track and report this information.

This amendment will have no effect on program efficiency since 45-day PCN review period has been part of the NWP program since 1996. This rule does not affect the reporting required under the 2001 Energy and Water Development Appropriations Act.

Several commenters recommended that the Corps amend the NWP regulations to include the 30-day completeness review for PCNs and allow the district engineer to make only one request for additional information to make a PCN complete.

The 30-day completeness review and the general rule regarding requests for additional information are adequately addressed through general condition 31, “pre-construction notification,” of the 2012 NWPs. The 2012 NWPs were promulgated as a rule, and we do not believe it is necessary to incorporate these provisions into 33 CFR part 330.

One commenter objected to the proposed amendment, and stated that the Corps should pursue available means to streamline consultations required by other Federal statutes, such as the Essential Fish Habitat (EFH) provisions of the Magnuson-Stevens Fishery Management and Conservation Act cited as an example in the preamble to the proposed rule. This commenter said that the EFH regulations provide mechanisms to

reduce administrative burdens on Federal agencies through programmatic consultations and general concurrences, to streamline the consultation process for classes of similar projects. These mechanisms could be used to conduct EFH consultations within the PCN review period stated in §330.1(e)(1).

We understand that the EFH regulations provide mechanisms to streamline the consultation process and comply with the requirements of the EFH provisions of the Magnuson-Stevens Fishery Management and Conservation Act. However, the use of those streamlining mechanisms is more appropriately addressed at the regional level, between Corps district offices and NMFS regional offices. In addition, those streamlining mechanisms may not be available for all NWP activities conducted across the country, so we believe that a regulation change is an appropriate course of action for accommodating the consultation requirements of the EFH provisions, as well as other revised consultation requirements, such as those promulgated for the purposes of Section 106 of the National Historic Preservation Act. Amending the NWP regulations also provides greater clarity and predictability for the public, by reducing the number of instances where it is necessary to revoke or suspend NWP authorizations in cases where consultation with other agencies is necessary to comply with applicable laws.

In the preamble to the November 30, 2004, proposed rule, we discussed the EFH regulations as an example of additional consultation and coordination requirements that have been imposed since the NWP regulations were last amended in 1991. The EFH regulations are simply one example. Another example is Section 106 of the National Historic Preservation Act, for which new implementing regulations were promulgated in 2000 and further revised in 2004. Under the Corps Regulatory Program's April 25, 2005,

and January 31, 2007, interim guidance, there is a 30-day review period for most determinations concerning effects to historic properties. In light of these examples and other requirements, we believe that amending the NWP regulations to be consistent with the 45-day pre-construction notification review period in the current NWP general condition 27 will help ensure compliance with all applicable statutes and regulations, while providing timely responses to NWP verification requests.

One commenter asked how the proposed rule would affect the process for incorporating the conditions of an individual Section 401 water quality certification that is issued after the district engineer completes the review of a PCN within the 45 day period. This commenter also requested that the final rule provide clarification on the process for incorporating the conditions of an individual water quality certification into an NWP authorization.

The amendment to section 330.4(c)(6) does not affect the provisional verification process for NWP activities that require individual water quality certification, or the process for incorporating water quality certification conditions into an NWP authorization. It only changes the PCN review period to 45 days to be consistent with the 45 day review period in the NWP “pre-construction notification” general condition. Regulatory Guidance Letter 92-04 provides guidance on incorporating water quality certification conditions into NWP authorizations. That guidance discusses, from the Corps perspective, what constitutes unacceptable conditions in water quality certifications and Coastal Zone Management Act consistency concurrences. Regulatory Guidance Letter 92-04 is available on the Internet at:

<http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl92-04.pdf> .

### Expiration Dates for Verification Letters

In the November 30, 2004, proposed rule we proposed to amend §330.6(a)(3)(ii) to allow district engineers to issue NWP verifications that are valid until the date the NWP expires, instead of requiring verifications to expire in two years or less. An NWP verification provides confirmation that a particular activity is authorized by NWP. This amendment will help promote administrative efficiency by eliminating the two year limit for NWP verifications, so that it will not be necessary for district engineers to reverify an NWP authorization when the permittee has not completed the authorized work within two years of the issuance of the NWP verification letter.

Many commenters expressed general support for proposed amendment of §330.6(a)(3)(ii). One commenter noted that under the proposed rule, district engineers have the discretion to issue NWP verifications for any specified time period, but generally the verification would have the same expiration date as the NWP.

We are adopting the proposed amendment in this final rule. District engineers may impose expiration dates on NWP verifications that occur earlier than the expiration date of the applicable NWPs, but they should document the reasons for shorter expiration dates. Shorter verification periods may be appropriate in cases where the authorized activity needs to be done by a specific date because of concerns for the aquatic environment or other public interest factors.

One commenter recommended that the final rule clarify that an NWP verification cannot extend past the expiration date of the NWP. This commenter said that allowing an NWP verification to be valid beyond the expiration date of an NWP conflicts with 33 CFR 330.6(b), which states that an NWP automatically expires if it is not modified or

reissued within five years of its effective date. Two commenters stated that the proposed rule limits NWP verification periods to the date the NWP expires, and that district engineers could not issue verifications that are valid for a period of time after the NWP expires. Those commenters suggested that the Corps clarify the amount of discretion afforded to district engineers when establishing expiration dates for case-specific NWP verifications. Three commenters asked whether district engineers could issue NWP verifications that are valid after the expiration date of the NWP.

As discussed above, the final rule contains flexibility for district engineers to establish expiration dates for NWP verifications, but in most cases the expiration date for an NWP verification letter will be the same as the expiration date for the applicable NWP(s). The first sentence of §330.6(a)(3)(ii) states that an NWP verification should be valid “generally until the expiration date of the NWP.” The amendment of §330.6(a)(3)(ii) does not affect §330.6(b). Section 330.6(b) of the NWP regulations provides up to 12 months to complete an NWP activity after the NWP expires, as long as that activity has commenced or is under contract to commence by the date the NWP expires. If an NWP verification letter is to be issued near the expiration date of the applicable NWP(s), the district engineer may inform the permittee of the availability of §330.6(b) to provide an additional 12 months to complete the authorized activity.

One commenter said that the proposed amendment conflicts with 33 CFR 330.6(b), which provides one year to complete the work authorized by an NWP, as long as the activity is under construction, or is under contract to commence construction, at the time the NWP expires, unless discretionary authority has been exercised. This commenter stated that although Section 404(e) of the Clean Water Act limits NWPs to five year



authorization periods, it does not limit the amount of time to complete the work once it is authorized by NWP.

This amendment does not conflict with 33 CFR 330.6(b). The additional year to complete the authorized work in reliance on the previous NWP allows permittees time to complete activities that have begun construction, or are under contract to begin construction. All Corps permits have specific construction periods, and if the project proponent cannot complete construction within those time periods, he or she must either obtain a time extension or a new individual permit or general permit authorization. Since the NWPs cannot be issued for a period of more than five years, the Corps cannot grant time extensions for those NWP activities beyond the 12 months provided in §330.6(b). If the previous NWP authorization expires and §330.6(b) does not apply, the Corps will evaluate the proposed activity and determine if it qualifies for authorization under any of the new, modified, or reissued NWPs. If the proposed activity does not qualify for any of the new, modified, or reissued NWPs, then the project proponent needs to obtain an individual permit or a regional general permit authorization.

Several commenters said that the final rule should include a “reasonable construction period” to allow a permittee sufficient time to complete an NWP activity without obtaining a new NWP verification. These commenters referred to the “construction period” general condition of the 2002 NWPs, which were published in the January 15, 2002, issue of the Federal Register (67 FR 2020). One commenter expressed support for the proposed amendment to this section, as long as the “construction period” general condition is not changed. Two commenters asserted that clarification is needed in the final rule, so that there is no conflict with “construction period” general condition.

Two commenters stated that the proposed rule would make the “construction period” general condition invalid. One commenter expressed concern that the proposed amendment would reduce the amount of time an NWP verification would be valid, especially in cases where the expiration date of the NWP is less than two years from the date of the verification letter. This commenter said that a permittee needs a reasonable amount of time to complete the authorized work, and suggested using the “construction period” general condition to address this concern.

As discussed in the March 12, 2007, Federal Register notice (72 FR 11171 – 11172), we have removed the “construction period” general condition from the NWPs. That general condition was removed because it is contrary to Section 404(e)(2) of the Clean Water Act, which imposes a five year limit on general permits. In light of the statutory time limit placed on general permits, NWP activities with long construction periods can be addressed in two ways.

Once an NWP expires, the permittee can utilize 33 CFR 330.6(b) to complete the work. That regulation allows permittees to continue work for 12 months in reliance on an NWP authorization, if that NWP has expired or been modified or revoked, and the activity is under construction or under contract to commence construction. If that NWP activity cannot be completed within that 12 month time period, then the permittee would have to obtain another DA authorization, which may be provided by a reissued or new NWP. We believe that 33 CFR 330.6(b) is sufficient to address concerns with projects that may not be completed before an NWP expires. For NWP activities that require substantial amounts of time to complete, project proponents should consider whether it would be more advantageous to pursue an individual permit authorization. Individual

permits can have greater flexibility in construction periods. An individual permit authorization can also be extended, as long as the district engineer determines that the time extension would be consistent with applicable regulations and would not be contrary to the public interest.

This change to the NWP regulations does not reduce the amount of time an NWP verification would be valid. In cases where a reissued NWP can be used to authorize the previously verified NWP activity, the Corps could issue a new verification letter that would be valid until that NWP expires. For those activities that do not qualify for the reissued NWP, the grandfather provision at 33 CFR 330.6(b) could continue to provide the NWP authorization for up to an additional 12 months for eligible activities, unless the district engineer exercises discretionary authority to modify, suspend, or revoke the NWP authorization. Having the NWP verification letter expire at the same time as the NWP itself expires will promote compliance and help protect the aquatic environment by requiring district engineers to consider whether the proposed activity still qualifies for NWP authorization under the terms and conditions of a reissued or new NWP. The reissued or new NWP may have changed substantially during the NWP reissuance process that the Corps conducts every five years, to protect the aquatic environment or other public interest review factors.

One commenter suggested linking the expiration date of the NWP verification to the expiration date(s) of any other required Federal authorizations to reduce duplication with other Federal programs. This commenter also said that re-verification of NWP activities should not be required if they are long-term activities that are subject to comprehensive regulation through another Federal environmental statute.

We do not believe it would be appropriate to link the expiration date of NWP verifications with other Federal authorizations. Other Federal environmental statutes often do not have exactly the same requirements as the statutes administered by the Corps. Therefore, there is often a need for the Corps to do an independent review or determination to ensure compliance with the laws that apply to the Corps regulatory program. Actions or outcomes required by other Federal environmental statutes often differ from Corps requirements. In addition, Section 404(e) of the Clean Water Act limits the issuance of general permits, including NWPs, to a maximum of five years.

One commenter requested clarification on how the proposed amendment of §330.6(a)(3)(ii) would affect situations where the NWP is revoked, modified, or expired during the time period specified in the verification letter.

If an NWP is revoked, suspended, or modified by the Chief of Engineers before the NWP verification letter expires, 33 CFR 330.6(b) applies. In other words, the project proponent would have 12 months to complete the authorized work, as long as he or she has commenced construction, or is under contract to commence construction, before the NWP was revoked, suspended, or modified and the district engineer has not exercised discretionary authority to modify, suspend, or revoke the NWP authorization.

#### Administrative Requirements

##### Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of "we" in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

### Paperwork Reduction Act

This action will not impose any new information collection burden under the provisions of the Paperwork Production Act (44 U.S.C. 3501 et seq.). For NWP that require PCNs, the modification changes the 30-day review period to a 45-day review period. In addition, the final rule changes the length of time an NWP verification letter could be valid. Since the final rule does not involve any additional collection of information from the public, this action is not subject to the Paperwork Reduction Act.

### Executive Order 12866 and Executive Order 13563, “Improving Regulation and Regulatory Review”

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Corps must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

Pursuant to the terms of Executive Order 12866, we have determined that the final rule is not a “significant regulatory action” because it does not meet any of these four criteria. This rule consists of minor modifications of existing regulations. For NWP that require PCNs, the final rule increases the 30-day review period to 45 days, which is consistent with the current general conditions for the NWPs. In addition, the final rule changes the length of time an NWP verification letter is generally valid.

#### Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.” The phrase “policies that have Federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

The final rule does not have Federalism implications. We do not believe that amending the regulation to increase the NWP PCN review period or increase the length of time an NWP verification letter may be valid will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not impose new substantive requirements. In addition, the changes will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this rule.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as : (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

Amending the NWP regulations to allow district engineers to issue NWP verification letters with expiration dates that are the same as the expiration date of the NWPs will benefit small entities who use NWPs. Implementation of this change will provide clarity, since the expiration date of the verification letter will usually match the expiration date of the NWP being used to authorize the activity. It will also eliminate uncertainty regarding whether re-verification is necessary in cases where the two-year verification letter expired before the date the NWP itself expired. The revised regulation will provide small entities with assurance that the NWP authorization is valid until the NWP expires.

Making the PCN review period in the NWP regulations consistent with the NWP “pre-construction notification” general condition will have no effect on small entities, since users of the NWPs must comply with all applicable terms and conditions of the NWPs, including the “pre-construction notification” general condition, which establishes time frames for PCN reviews.

After considering the economic impacts of this rulemaking on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. The ability for district engineers to issue NWP verification letters that have the same expiration date as the NWPs themselves will benefit small entities by providing clarity and reducing paperwork burdens. Amending the NWP regulation to have the same PCN review period as the NWP “pre-construction notification” general condition will also provide clarity and regulatory certainty. This final rule is consistent with current agency practice, does not impose new substantive requirements, and therefore would not have a significant economic impact on a substantial number of small entities.

#### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally



requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the final rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. This rule is consistent with current agency practice, does not impose new substantive requirements and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, the final rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that this

rule contains no regulatory requirements that might significantly affect small governments. Therefore, it is not subject to the requirements of Section 203 of UMRA.

#### Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of this rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The final rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

#### Executive Order 13175

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between

the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. It is generally consistent with current agency practice and does not impose new substantive requirements. Therefore, Executive Order 13175 does not apply to this rule.

#### Environmental Documentation

The Corps prepares appropriate environmental documentation, including Environmental Impact Statements when required, for all permit decisions. Therefore, environmental documentation under the National Environmental Policy Act is not required for this rule. Appropriate environmental documentation, which includes an environmental assessment, is prepared for each NWP when it is issued, reissued, or modified.

#### Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days

after it is published in the Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

#### Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The final rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

#### Executive Order 13211

This rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The final rule updates regulations for implementing the Nationwide Permit Program. The rule is consistent with current agency practice, does not impose new substantive requirements and therefore will not have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 33 CFR Part 330

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

Dated: January 22, 2013. \_\_\_\_

Approved by: \_\_\_\_\_

Jo-Ellen Darcy

Assistant Secretary of the Army

(Civil Works)

For the reasons stated in the preamble, the Corps is amending 33 CFR part

330 as follows:

PART 330 - - NATIONWIDE PERMIT PROGRAM

1. The authority citation for part 330 continues to read as follows:

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Amend § 330.1 by revising paragraph (e)(1) to read as follows:

§ 330.1 Purpose and policy.

\* \* \* \* \*

(e) \* \* \*

(1) In most cases, permittees may proceed with activities authorized by NWP without notifying the DE. However, the prospective permittee should carefully review the language of the NWP to ascertain whether he must notify the DE prior to commencing the authorized activity. For NWPs requiring advance notification, such notification must

be made in writing as early as possible prior to commencing the proposed activity. The permittee may presume that his project qualifies for the NWP unless he is otherwise notified by the DE within a 45-day period. The 45-day period starts on the date of receipt of the notification in the Corps district office and ends 45 calendar days later regardless of weekends or holidays. If the DE notifies the prospective permittee that the notification is incomplete, a new 45-day period will commence upon receipt of the revised notification. The prospective permittee may not proceed with the proposed activity before expiration of the 45-day period unless otherwise notified by the DE. If the DE fails to act within the 45-day period, he must use the procedures of 33 CFR 330.5 in order to modify, suspend, or revoke the NWP authorization.

\* \* \* \* \*

3. Amend § 330.4 by revising paragraphs (c)(6) and (d)(6) to read as follows:

§ 330.4 Conditions, limitations, and restrictions.

\* \* \* \* \*

(c) \* \* \*

(6) In instances where a state has denied the 401 water quality certification for discharges under a particular NWP, permittees must furnish the DE with an individual 401 water quality certification or a copy of the application to the state for such certification. For NWPs for which a state has denied the 401 water quality certification, the DE will determine a reasonable period of time after receipt of the request for an activity-specific 401 water quality certification (generally 60 days), upon the expiration of which the DE will presume state waiver of the certification for the individual activity covered by the NWPs. However, the DE and the state may negotiate for additional time

for the 401 water quality certification, but in no event shall the period exceed one (1) year (see 33 CFR 325.2(b)(1)(ii)). Upon receipt of an individual 401 water quality certification, or if the prospective permittee demonstrates to the DE state waiver of such certification, the proposed work can be authorized under the NWP. For NWPs requiring a 45-day pre-construction notification the district engineer will immediately begin, and complete, his review prior to the state action on the individual section 401 water quality certification. If a state issues a conditioned individual 401 water quality certification for an individual activity, the DE will include those conditions as activity-specific conditions of the NWP.

\* \* \* \* \*

(d) \* \* \*

(6) In instances where a state has disagreed with the Corps consistency determination for activities under a particular NWP, permittees must furnish the DE with an individual consistency concurrence or a copy of the consistency certification provided to the state for concurrence. If a state fails to act on a permittee's consistency certification within six months after receipt by the state, concurrence will be presumed. Upon receipt of an individual consistency concurrence or upon presumed consistency, the proposed work is authorized if it complies with all terms and conditions of the NWP. For NWPs requiring a 45-day pre-construction notification the DE will immediately begin, and may complete, his review prior to the state action on the individual consistency certification. If a state indicates that individual conditions are necessary for consistency with the state's Federally-approved coastal management program for that individual activity, the DE will include those conditions as activity-specific conditions of the NWP unless he determines

that such conditions do not comply with the provisions of 33 CFR 325.4. In the latter case the DE will consider the conditioned concurrence as a non-concurrence unless the permittee chooses to comply voluntarily with all the conditions in the conditioned concurrence.

\* \* \* \* \*

4. Amend § 330.6 by revising paragraph (a)(3)(ii) to read as follows:

§ 330.6 Authorization by nationwide permit.

(a) \* \* \*

(3) \* \* \*

(ii) The DE's response will state that the verification is valid for a specific period of time (generally until the expiration date of the NWP) unless the NWP authorization is modified, suspended, or revoked. The response should also include a statement that the verification will remain valid for the specified period of time, if during that time period, the NWP authorization is reissued without modification or the activity complies with any subsequent modification of the NWP authorization. Furthermore, the response should include a statement that the provisions of § 330.6(b) will apply, if during that period of time, the NWP authorization expires, or is suspended or revoked, or is modified, such that the activity would no longer comply with the terms and conditions of an NWP. Finally, the response should include any known expiration date that would occur during the specified period of time. A period of time less than the amount of time remaining until the expiration date of the NWP may be used if deemed appropriate.

\* \* \* \* \*



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